IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-0695
Polk County No. LACL124195

CHRISTOPHER J. GODFREY,

PLAINTIFF-APPELLANT,

v.

STATE of IOWA; TERRY BRANSTAD, Governor of the State of Iowa, in his individual and official capacity; KIMBERLY REYNOLDS, Lieutenant Governor of the State of Iowa, in her individual and official capacity; JEFF BOEYINK, Chief of Staff to the Governor of the State of Iowa, in his individual and official capacity; BRENNA FINDLEY, Legal Counsel to the Governor of the State of Iowa, in her individual and official capacity; TIMOTHY ALBRECHT, Communications Director to the Governor of the State of Iowa, in his individual and official capacity; and TERESA WAHLERT, Director, Iowa Workforce Development, in her individual and official capacity,

DEFENDANTS-APPELLEES.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE BRAD McCALL

APPELLANT'S REPLY BRIEF

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A. PLAINTIFF'S CLAIMS ARE NOT PREEMPTED BY IOWA CODE CHAPTER 216

1. Constitutional Rights are Inherently Different Than Rights Afforded By Statute

The Iowa Civil Rights Act, Iowa Code Chapter 2016, confers statutory rights as created by legislative action. Constitutional rights arise from an independent source - the guaranties of the Iowa Constitution itself. See, *State v. Short*, 851 N.W.2d 474 (Iowa 2014) (discussing the relevance and gravity of threats to individual liberties guaranteed by Iowa's Bill of Rights). Defendants in this case include the State and state actors. Plaintiff and other similarly situated plaintiffs should be afforded every avenue of redress and every opportunity to deter the State and its agents from engaging in unlawful behavior - not only for those who are members of an ICRA "protected class", but in ***every*** instance in which a citizen's most basic and fundamental rights are threatened by governmental wrongdoing. The ICRA cannot, and should not, function as a means to vindicate constitutional wrongs.

There is also an important difference that Defendants have failed to acknowledge between claims brought pursuant to the Iowa Civil Rights Act

and claims brought pursuant to the Iowa Constitution. As a preliminary matter, the ICRA's exclusivity provision requires discrimination plaintiffs to exhaust their administrative remedies before appealing to the district court for relief, an administrative step that is not necessary in order to bring constitutional claims.[1] Not only do rights and remedies differ, i.e. punitive damages may be awarded in a *Bivens*-type claim, while such damages are not available under the ICRA, the very origin of the claims themselves are entirely separate, even where the events giving rise to a legal action are shared.

Furthermore, there is a distinct difference in general between any statutory remedy and a remedy pursuant to the Iowa Constitution. Conceivably, the Iowa Legislature could completely abolish remedies for discrimination or other statutorily created wrongs, as statutory law resides within the domain of legislative powers. Constitutional rights, on the other hand, cannot be extinguished without a lengthy procedural process, including a vote by the people of Iowa themselves.

[1] Iowa Code § 216.16(1) states "A person claiming to be aggrieved by an unfair or discriminatory practice must initially seek an administrative relief by filing a compliant with the commission in accordance with section 216.15. This provision also applies to persons claiming to be aggrieved by an unfair or discriminatory practice committed by the state…" Iowa Code § 216.16(1).

In *Laird v. Ramirez*, 884 F. Supp. 1265 (N.D. Iowa 1995), the Court found that the plaintiff's claim which alleged that a state agency had violated his equal protection rights was not barred by the existence of remedies contained in the Social Security Act ("SSA"), 42 §§ 1901 et seq., as amended, 42 U.S.C. §§ 1396, et seq. The Court concluded that Congress had established the remedial scheme of the SSA to vindicate the rights secured by the SSA, not to vindicate rights secured by the Constitution. *Id*., at 1285. Although the wrongful conduct was the same in each case, the wrong that each remedy was intended to address was different – one a violation of statute, the other a violation of federal and constitutional rights. *Id*., at 1286. Thus, the Court stated, the plaintiff was not, as the defendants contended, attempting to gain procedural advantage, but was instead seeking to vindicate a right springing from a different source through the procedures applicable to that right. *Id*. "When two independent claims exist, certainly no inconsistency results from permitting both rights to be enforced in their respective forums. *Id*., (citations omitted).

In *Wintergreen Group, L.C. v. Utah Department of Transportation*, 171 P.3d 418, 422 (Utah 2007), the Utah Supreme Court expressed extreme

reluctance to allow *any* statutory remedial scheme to trump a constitutional cause of action.

> "***Owing to its different lineage, a constitutional cause of action can never be preempted by statute, regardless of how fully the statute honors the contours of the constitutional claims***. Thus, even if Utah's direct condemnation statute provides the full complement of procedural and substantive rights afforded a property owner by the constitution, that statute cannot be said to have preempted the constitutional claim. Rather, any codification of a constitutional cause of action labors in the service of a constitutional cause of action by setting out the process by which those entitled to constitutional relief may acquire it.".

Id. (emphasis added).

Similarly, in *Shuttleworth v. Broward County*, 639 F. Supp. 654, 660 (S.D. Fla. 1986), the defendants moved for summary judgment on the plaintiff's civil rights and constitutional claims alleging employment discrimination as a result of his contracting Acquired Immune Deficiency Syndrome, arguing that the Florida Human Rights Act provided the plaintiff's exclusive remedy. The Court, however, was not persuaded that the Act was intended to be the sole remedy available to persons alleging discrimination by state entities and held that the plaintiff could bring a claim directly under the Florida Constitution. *Id.*, (citation omitted). See also, *Arroyo v. Rattan Specialties, Inc.*, 1986 WL 376812 *75 (D.P.R.).

The concept of co-existent remedies is a generally accepted principle that has been applied throughout Iowa jurisprudence to ensure that plaintiffs are made whole by allowing them to pursue all appropriate remedies in each of their respective forums. For example, the doctrine of election of remedies does not preclude distinct and independent grounds of action which arise from the same set of circumstances and which may be concurrently or consecutively pursued to satisfaction. *Gray v. Brown*, 332 N.W.2d 323, 324 (Iowa 1983). A party may pursue consistent remedies concurrently, even to final adjudication, until one of the claims is satisfied, inasmuch as, when remedies are factually consistent, an inconsistency does not arise until one of the remedies is satisfied. *First Security Bank of Brookfield v. McClain*, 403 N.W.2d 788, 790 (Iowa 1987). Remedies are only "inconsistent" when the facts relied upon as a basis for one remedy are repugnant and contradictory to the facts relied upon as a basis for the other remedy. *Id*. The present case does not contain such inconsistencies. Constitutional claims are inherently different than claims derived from statutes. Plaintiff is entitled to a full and fair remedy appropriate for the damages he incurred due to the violation of his constitutional rights.

2. Plaintiff Alleges Wrongdoing Not Covered by the ICRA– Retaliatory Partisan Politics

The ICRA provides the exclusive remedy ***only*** for conduct prohibited by the statute itself. Iowa Code Chapter 216. It is universally understood that to obtain relief under the ICRA, a complainant must first demonstrate that he or she belongs to a group that the Act protects. *Brown v. Hy-Vee Food Stores, Inc.*, 407 N.W.2d 598 (Iowa 1987). Iowa Code § 216.6(1)(a) defines an unfair employment practice as a refusal "to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant or employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation.". *Id.* If an aggrieved employee is not a member of a protected class, the ICRA offers no recourse. Although Plaintiff, as a gay man, is a member of a protected class, there are any number of Iowa employees who are not and, therefore, are not covered by the ICRA. Furthermore, Plaintiff's constitutional claims rest on, not only his membership in this protected class,

but the injuries he suffered due to Defendants' retaliatory partisan political motives.

The ICRA is not the exclusive remedy if a plaintiff's claims are "separate and independent" from the discriminatory conduct. *Greenland v. Fairtron Corp.* 500 N.W.2d 36, 37 (Iowa 1993). Plaintiff in the present case, along with alleging that sexual orientation played a role in Defendants' conduct, has also alleged that partisan politics was a motive. While discrimination based upon sexual orientation is prohibited by the ICRA, the same behavior based upon partisan politics is not. Moreover, as discussed above, Defendants' conduct is not only discriminatory under the ICRA, but represents a violation of Plaintiff's benefits and privileges pursuant to the Iowa Constitution, triggering claims that arise from a different source, protect different rights, require different elements of proof and provide different remedies.

The test of whether a claim is preempted by the ICRA's exclusivity provision is whether, in light of the pleadings, discrimination is made an element of the non-ICRA claims. *Channon v. United Parcel Service, Inc.*, 629 N.W.2d 835, 857 (Iowa 2001). Preemption most frequently occurs if a plaintiff brings a tort claim supported by factual allegations based in conduct

prohibited by the ICRA. *Napreljac v. John Q. Hammons Hotels, Inc.*, 461 F. Supp. 2d 981, 1038 (S.D. Iowa 2006). The key to this analysis is how a plaintiff's claim is cast in the pleadings. *Id.*, at 103 (citations omitted). Count VI of Plaintiff's Third Amended Petition alleges denial of procedural and substantive due process under the Iowa Constitution, not only through sexual orientation discrimination, but for partisan political purposes. Count VII alleges denial of procedural and substantive due process under the Iowa Constitution through "stigmatizing Plaintiff by publicly and falsely claiming that their illegal and unreasonable demands for his resignation and ultimate reduction in his pay were due to Plaintiff's poor work performance". (App 17, Third Amended Petition, ¶ 97). Count VIII alleges an equal protection violation under the Iowa Constitution due to Defendants' "engaging in a practice or custom with the purpose and intent to discriminate". (App. 18, Third Amended Petition, ¶ 104). Count IX alleges an equal protection violation under the Iowa Constitution due to Defendants' establishment of "policies that treat homosexual appointive state officers differently than heterosexual appointive state officers, by slandering them and illegally reducing their salaries." (App. 19, Third Amended Petition ¶ 112).

Examples of cases in which the court has not found preemption when deciding tort and contract claims, are instructive. In *Knutson v. Sioux Tools, Inc.*, 990 F. Supp. 1114, 1120 (N.D. Iowa 1998), the Court found that the plaintiff's claims for emotional distress, breach of contract and interference with contract were not based solely on discriminatory conduct, but also upon allegedly assaultive conduct that could be wrongful entirely independently of whether it was also discriminatory. Assault and battery, the Court explained, are not preempted by the ICRA, as they exist independently of discrimination, ***even if*** based on conduct that is also allegedly discriminatory. *Id*. (emphasis added). Thus, they are separate causes of action that may be brought in addition to claims maintained pursuant to the ICRA. *Id*. (citation omitted). The *Knutson* Court held that to the extent that the breach of contract claim brought by the employee alleged failure to provide a work environment free from assaults, the ICRA prohibiting discrimination against employees would not be the employee's exclusive remedy for the wrong alleged. *Id*.

In *Thompto v. Coborn's Inc.*, 871 F. Supp. 1097, 1111 (N.D. Iowa 1994), the plaintiff brought sex discrimination claims under the ICRA, along with common law claims of wrongful discharge and intentional infliction of

emotional distress. The Court found that both tort claims were based, at least in part, on the plaintiff's alleged termination for inquiring about cancer insurance coverage and requesting an explanation for why the coverage was not available, along with threatening to hire a lawyer to obtain either the coverage or an explanation. *Id.* "It is not necessary to prove sex discrimination in this case for [the plaintiff] to prevail on her common law tort claims." *Id*. Thus, the Court granted the defendant's summary judgment motion only to the extent that the claims were based on sex discrimination. *Id*.

However, as discussed previously, even if Plaintiff's claims in the present case were, in fact, found to be dependent upon proof of conduct prohibited by the ICRA, they would not be preempted by the Act due to their constitutional, not common law tort, origin. To the extent that the ICRA provides a remedy for a particular discriminatory practice, its procedure is exclusive and the claimant asserting that practice must pursue the remedy it affords. *Smidt v, Porter*, 695 N.W.2d 9, 16 (Iowa 2005). But to the extent that the ICRA does not afford a remedy, its application is inappropriate.

The ICRA is clearly an improper vehicle for enforcing constitutional rights. The Act applies to statutorily defined sexual discriminatory conduct

in order to protect only a statutorily defined set of individuals. Constitutional rights apply to all of the people all of the time and bar any kind of conduct that encroaches upon such rights. Thus, the narrower confines of the ICRA are insufficient to enforce these much broader and more basic entitlements. The ICRA, while certainly an exceedingly useful tool in holding wrongdoers accountable for their discriminatory actions in employment, housing, public accommodations and other areas is intended to address a statutorily defined set of circumstances, while the Iowa Constitution grants broad protective rights with respect to unlawful governmental violations which fall outside the scope of the ICRA.

In *Carlson v. Green*, 446 U.S. 14, 18-20 (1980), the United States Supreme Court recognized an implicit right to sue for damages under the Eleventh Amendment, despite the presence of a statutory cause of action under the Federal Tort Claims Act, 28 U.S.C. § 2671. In *Carlson*, suit was brought against federal prison officials for their alleged inattention to an inmate's asthma, which caused his death. *Id.* The Court found that the FTCA was not an exclusive remedy and that a *Bivens*-like claim, one vindicating constitutional rights under the Constitution, was a "parallel, complementary cause of action". *Id.* "Plainly [the FTCA] is not a sufficient

protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy." *Id.*, at 23. See also, *Owen v. City of Independence, Mo*., 445 U.S. 622, 657 (1980). A fundamental principal underlying the *Bivens* decision is that a government official acting unlawfully in the name of the state "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

In the present case, Plaintiff is entitled to proceed both under the ICRA for the discrimination and retaliation he endured in the employment realm and directly against Defendants with his constitutional rights violations claims arising from Defendants' broader attack on his personal freedoms. The ICRA does not act as a bar to Plaintiff's constitutional claims, but rather as a concurrent remedial resource so that Plaintiff and others similarly situated may seek a fair and complete resolution.

To hold that a plaintiff's constitutional claims must be brought exclusively through the ICRA would deny the very essence of what constitutes inalienable rights and would sharply curtail the kinds of unlawful

conduct for which a remedy may be had. Obviously, not every case of constitutional rights violations will have a remedy under the ICRA. This is because not every case which involves a violation of constitutional provisions is rooted in discriminatory conduct, i.e. claims of excessive force, violations of equal protection or due process, not directed towards a person in a protected class or committed within the scope of the ICRA. To limit those who have experienced constitutional rights violations to the ICRA alone would leave many a plaintiff with no remedy. Iowa courts have acknowledged that this would not be not a logical or desirable outcome. For example, a common law action for wrongful discharge exists in Iowa precisely because some plaintiffs are wrongfully discharged in the *absence* of discrimination. Thus, when the remedial scheme of the ICRA does not apply, such plaintiffs may still find a remedy for the wrongful conduct they have endured. Iowa jurisprudence should similarly provide a remedy for those who suffer state constitutional violations.

B. THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE IOWA CONSTITUTION ARE SELF-EXECUTING AND PLAINTIFF HAS A VALID CLAIM UNDER EACH

1. The Equal Protection and Due Process Clauses of the Iowa Constitution are Self-Executing

Defendants attempt to portray Iowa jurisprudence as having definitively rejected the self-executing nature of the Iowa Constitution. This, however, is simply not the case. In *Pierce v. Green*, 229 Iowa 22, 294 N.W. 237, 243 (1940), which Defendants cite, the Court discusses Article VIII, Section 2 of the Iowa Constitution as it pertains to taxation and valuation of property. It noted that uniform application of this provision is essential to ensuring an equal tax burden for all citizens. *Id*. In dicta, it indicated that this provision was not self-executing because it does not specify that any particular valuation of property or percentage of valuation should be used as a base for computing the tax. *Id*. Instead, it looked to the statutory requirements regarding taxation in order to define the specific nuances of valuation and assessment. *Id*., citing Iowa Code § 7109 (1935, 1939).

Defendants cite *Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996) for the same premise. However, the Court in that case merely held that the plaintiff police officer's assertion that he had been more

severely disciplined than others within his class did not suffice as a basis for a claim of violation of equal protection. *Id.* Similarly, in *State ex rel. Halbach v. Claussen*, 216 Iowa 1079, 250 N.W. 195, 198 (1933), the Court held that the provisions of the Iowa Code pertaining to filling vacant governmental offices should govern, as the Iowa Constitution did not provide the "machinery" for making nominations or holding elections and was not designed for that purpose. Iowa Code §§ 1155, 1157 (1931). None of these cases support Defendants' assertion that the equal protection and due process clauses of the Iowa Constitution are not self-executing.

Defendants also claim that "[t]he general assembly shall pass all laws necessary to carry this constitution into effect" would be rendered superfluous if, in fact, the Iowa Constitution is self-executing. Defendants, however, fail to take into account that it is not always ***necessary***, as this clause directs, to enact legislation in order to trigger constitutional protections and claims. Of course, in some instances, such as issues concerning taxation and filling governmental offices, legislation may be necessary to define the specific directives required to carry out the constitutional mandate. But with respect to equal protection and due process violations, which provide Iowa citizens with broad and all-encompassing

protection against governmental intrusion upon any number of fundamental personal rights and liberties, no legislation is necessary to guide their execution.

Defendants cite Texas and Montana case law to support their contention that "[t]he Iowa Constitution does not authorize general lawsuits for money damages other than in the context of eminent domain." However, the concept of eminent domain is not one which encompasses the right to a cause of action for damages that result from a wrongdoing, but one of compensation to a landowner for the government's lawful taking of property. Eminent domain is the power of the government to take private property for public use conditioned upon the payment of just compensation. *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). Such compensation is not comparable to a claim for money damages.

Other states' statutory recognition of a private cause of action for damages pursuant to their state constitutions does not negate the self-executing nature of the equal protection and due process clauses of the Iowa Constitution, but instead demonstrates the importance of preserving such rights by ensuring that they are provided with the utmost protection, both constitutionally and statutorily. Defendants attempt to portray the enactment

of such statutes as evidence that Iowa has rejected such protection. (Ds' brief, pp. 20-21). However, the existence of such statutes certainly does not indicate that this has occurred, but merely indicates that the states which have enacted them are further acknowledging the essential rights to equal protection and due process so as to avoid any potential challenge – such as the one at issue in the present case - to their citizens' ability to initiate a direct cause of action when their state constitutional rights are violated.

Moreover, no separation of powers issue exists with respect to the judiciary enforcing constitutional rights. As the United States Supreme Court has recognized:

> "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner…The Constitution, on the other hand, does not partake of the prolixity of a legal code. It speaks instead with a majestic simplicity. One of its important objects is the designation of rights. And in its great outlines, the judiciary is clearly discernible as the primary means through which these rights may be enforced."

Davis v. Passman, 442 U.S. 228, 241 (1979) (quotations omitted). Legislative action is simply not required for Iowa citizens to seek compensation for the violation of their state constitutional rights.

2. Plaintiff Has Valid Equal Protection and Due Process Claims Under the Iowa Constitution

a. Plaintiff Had a Recognized Property Interest

The Iowa County Attorneys Association erroneously suggests in its amicus curie brief that Plaintiff has no property issue at stake in this case which would trigger due process protection. In *Greenwood Manor v. Iowa Department of Public Health*, 641 N.W.2d 823 (Iowa 2002), which the ICAA cites in support of its position, the plaintiff nursing facilities petitioned for judicial review of a decision by the State Health Facilities Council to grant a "certificate of need" for a proposed new facility not associated with their own. The Iowa Supreme Court did, in fact, acknowledge the existence of a property interest ("the actual issuance of a certificate of need conveys a property interest on the holder of the certificate"), finding only that the plaintiffs did not have an interest in a ***competitor facility's*** certification. *Id*. (emphasis added).

Similarly, in *Bailiff v. Adams County Conference Board*, 650 N.W.2d 621, 625 (Iowa 2002), which the ICAA also cites, the Court held that the plaintiff did not have a property interest in continued occupancy of his position as county assessor even where the term was statutorily set at six

years. This case, however, is distinguishable. The Court found that the *Bailiff* plaintiff's appointment had not been made in strict compliance with the statute and administrative rules and was, therefore, void. *Id.* His status when his initial term expired was only as a holdover, as the board vote that "appointed" him to a succeeding term was defective. *Id.* This case's mitigating issue is not present in the case at bar.

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972), another ICAA cited case, an assistant professor at a state university, who had no tenure rights to continued employment and who was informed that he would not be rehired after his first academic year, alleged that the decision not to rehire him infringed upon his Fourteenth Amendment due process rights. The Court, however, found that since there was not state statute or university rule or policy that secured his interest in reemployment or created any legitimate claim to it, he did not have a constitutionally protected property interest in his continued employment. *Id.* In the present case, unlike in *Roth*, state statute mandated a six-year term. Iowa Code §86.1 (2011). Thus, the *Roth* holding is inapplicable. Instead of having, as the Court described in *Roth*, a mere "abstract need or desire" or "unilateral expectation", Plaintiff Godfrey's benefit of continued employment was

guaranteed by Iowa law, creating a legitimate claim of entitlement which is protected by the constitutional due process provision. See, *Roth*, 408 U.S. 564, 576 (1972).

Roth does, however, provide guidance in terms of the appropriate definition of a property right for purposes of interpreting violations of constitutional due process. *Id., at* 576. It observed that, "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id*. Procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. *Id.* Such interests may take many forms. *Id.* For example, one receiving welfare benefits under statutory and administrative standards defining eligibility has a protected interest in continued receipt of those benefits. *Id.*, citing *Goldberg v. Kelly*, 397 U.S. 254 (1969). Similarly, tenured public college professors and those, including other staff members, dismissed during the terms of their contracts have protected interests in continued employment. *Id.*, citing *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952). Plaintiff Godfrey's property interest in his salary during his six-year term as Workers' Compensation Commissioner

was similarly grounded in Iowa statute and is no less protected by the state constitutional due process provision than the *Roth* plaintiff's interest was protected by the corresponding federal provision.

b. Plaintiff's Due Process Claim is Based Upon Defendants' Actions That Extend Beyond a Salary Reduction

The ICAA also labors under the false assumption that Plaintiff's due process claim is based solely upon the reduction in his salary perpetuated against him by Defendant Branstad, or as ICAA describes it, "a salary decision that the law empowered the governor to make". (ICAA amicus curie brief, p. 5). The ICAA's assumption is incorrect.

It is undisputed that the governor has the statutory right to set the Workers' Compensation Commissioner's salary within the range proscribed by law. The Commissioner's salary may certainly be adjusted for lawful purposes and Plaintiff does not advocate otherwise. However, the governor does not have the right to arbitrarily and without legitimate justification set the salary at its lowest possible point in order to force a resignation based upon forbidden reasons, namely partisan politics or Plaintiff's sexual orientation or both. It is these underlying unlawful motives that violated Plaintiff's property interest in the continuation of his lawful rate of pay

during his statutorily defined term and infringed upon due process, not the reduction of his salary standing alone. This is a significant distinction, one that the ICAA has conveniently ignored.

In addition, the same law that allows the governor to set the Commissioner's salary is also the law that mandates a six-year term of employment. If the ICAA wishes to advocate for a governor's right to act pursuant to this statute, it must also be willing to acknowledge the statute's delineation of the Commissioner's term of years. It cannot have it both ways.

c. Defendants' Actions Which Were Improperly Based Upon Partisan Politics Are Appropriate Wrongdoings Upon Which to Base Plaintiff's Claims

The ICAA mistakenly believes that Defendants in this case were absolutely justified in pressuring Plaintiff to resign, even if it was for political purposes. (ICAA amicus curie brief, pp. 23, 26). It claims that Defendant Branstad's executive power and Plaintiff's position as a "policymaker" legitimized Defendants' action and that if this Court decides in favor of Plaintiff, the state's governor and other state supervisory personnel would be forced to relinquish their ability to choose their own

staff, committee appointee and even an election running mate. *Id*., at pp. 24-26, 29-30). However, nothing could be further from the truth.

While Defendant Branstad, as Iowa governor, is the head of the executive branch of state government, his power to act is certainly not unlimited and does not allow prohibited conduct, whether or not a state employee is classified as a "policymaker". (See, ICAA amicus curie brief, pp. 24-26). Pursuing a prohibited agenda behind a proffered legitimate justification does not change the nature of the wrongful conduct or the appropriateness of seeking redress for such conduct.

d. Validity of a *Bivens* Claim Under Iowa Law

Defendants and the amicus parties criticize the *Bivens* holding, but like it or not, it is still good law and still serving as the inspiration and foundation for state courts when asked to provide a remedy for state constitutional violations. Defendants' citation to *Minneci v. Pollard*, 132 S. Ct. 617 (2012) in support of its position that Plaintiff in the present case has alternative remedies is clearly in error. In *Minneci*, the U.S. Supreme Court held that a prisoner could not assert an Eighth Amendment *Bivens* claim for damages against private prison employees. *Id.* The ability of a plaintiff to bring a state tort law damages claim against a ***private*** individual means that

such a plaintiff does not lack effective remedies. *Id*., at 623, citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72 (2001) (emphasis in original). Since Defendants in the case at bar are state actors, not private actors, the holding in *Minneci* is wholly inapplicable.

Defendants' claim that Plaintiff has an "alternative" remedy due to his pending claim in the United States District Court, Southern District of Iowa, and that, therefore, a *Bivins* claim at the state court level should not be allowed, is incorrect. Plaintiff's claims in the federal court are brought pursuant to federal statutory and constitutional law. Section 1983 provides a federal claim for litigants who believe that state officials have taken action against them in violation of their rights under the federal constitution or their rights under federal law. 42 U.S.C. § 1983; *Harrington v. Schossow*, 457 N.W.2d 583, 585 (Iowa 1990). Plaintiff's claims before this Court, however, are brought pursuant to state constitutional law, to which § 1983 is inapplicable. State courts of general original jurisdiction have the duty to hear and determine cases properly before them. *Kruidenier v. McCulloch*, 257 Iowa 1315, 1317, 136 N.W.2d 546, 547 (1965). Such courts may not deny relief to persons properly before them to the extent to which they are entitled and the courts have power to afford under the circumstances. *Id*. A

federal claim in federal court is not a viable alternative to address Plaintiff's state constitutional claims.

Defendants' characterization of the United States Supreme Court's decisions since *Bivens* as a "retreat" from that case's holding is not accurate. (Ds' brief, pp. 26-27). Defendants cite *Davis*, 442 U.S. 228 (1979) as an example of such a "retreat". However, on the contrary, in that case the Court found that the government-employed petitioner, who alleged that she had been discriminated against on the basis of her sex in violation of the Fifth Amendment, had stated a constitutional cause of action and that her injury could be redressed by a damages remedy. *Id*., at 248-49 ("We conclude, therefore, that in this case, as in *Bivens*, if petitioner is able to prevail on the merits, she should be able to redress her injury in damages, a remedial mechanism normally available in federal courts." *Id*., at 248 (quotation omitted).

Defendants' other cited cases for its position similarly offer no support. None of these cases signify a "retreat" from *Bivens*' basic tenets. The majority of the cases simply discuss *Bivens*. Only three of these cases decline to extend *Bivens*' reach, and in those instances, the central *Bivens* holding remains intact. See, *Minneci*, 132 S. Ct. 617 (2012) (declined to

allow an inmate a *Bivens* for damages against a private prison employee); *Correctional Services*, 534 U.S. 61 (2001) (declined to imply *Bivens* claim against private entities while acting under color of federal law); *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) (declined to allow a *Bivens* claim against a federal agency, reasoning that if such a claim were allowed, there would no longer be any reason for aggrieved parties to bring damages actions against individual officers and the deterrent effects of the *Bivens* remedy would then be lost). In *Carlson*, 446 U.S. 14 (1980), also cited by Defendants, the Court reasoned that the *Bivens* remedy was a more effective deterrent than the Federal Tort Claims Act, as unlike the FTCA, a *Bivens* remedy was recoverable against individuals, allowed punitive damages, allowed for a jury trial, and was not confined to existence only where the state in which the alleged misconduct occurred would allow the cause of action for that misconduct to go forward. *Id.*, at 20-23.

There are any number of United States Supreme Court cases that treat *Bivens* in a positive light and in no way represent a retreat from its holding. See, i.e. *Butz v. Economou*, 438 U.S. 478 (1978); *Farmer v. Brennan*, 511 U.S. 825 (1994); *United States v. Smith*, 499 U.S. 160 (1991); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Mitchell v. Forsyth*, 472

U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Groh v. Ramirez*, 540 U.S. 551 (2004). Defendants' suggestion that the United States Supreme Court has retreated from the core *Bivens* holding in any significant way is simply wrong. Even if this were correct, the United States Supreme Court decisions would not be binding on the Iowa Supreme Court in its decisions on the scope of the Iowa Constitution.

C. PLAINTIFF SEEKS ACKNOWLEDGEMENT FROM THIS COURT THAT CITIZENS WHOSE CONSTITUTIONAL RIGHTS ARE VIOLATED BY STATE ACTORS MAY SEEK REDRESS DIRECTLY UNDER AND PURSUANT TO THE IOWA CONSTITUTION

Defendants' characterization of Plaintiff's constitutional claims as "new" causes of action is somewhat misleading. It is Plaintiff's contention that the right to seek redress under the Iowa Constitution itself when individuals' constitutional rights have been trampled by state actors is not a novel proposal, but one that is inherent to constitutional guarantees. The equal protection and due process clauses of the Iowa Constitution are self-executing and need no legislative action to trigger the protection that they offer. Moreover, Plaintiff has no other adequate remedy by which to address his damages.

No separation of powers issues exist which would bar this Court from allowing Plaintiff to move forward with his constitutional claims. The case law from other jurisdictions that have declined to recognize a private cause of action for violations of their state constitutions in the absence of enabling legislation are in the minority. (See, P's brief, pp. 29-30, 68). The majority of Iowa's own case law and federal case law pertaining to Iowa jurisprudence either indicate directly that such a cause of action should be inherently recognized or pave the way for such recognition. See, i.e. *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009); *Countryman v. Mt. Pleasant Bank & Trust Co.*, 357 N.W.2d 599, 605 (Iowa 1984); *McCabe v. Macaulay*, 551 F. Supp. 2d 771 (N.D. Iowa 2007) (aff'd in part and rev'd in part on other grounds by *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010)); *Peters v. Woodbury County, Iowa*, 979 F. Supp. 2d 901 (N.D. Iowa 2013); *Hood v. Upah*, 2012 WL 2906300 (N.D. Iowa). The Iowa judiciary has the "responsibility to independently construe the Iowa Constitution" and is its guardian and final arbiter. *Short*, 851 N.W.2d 474, 481 (Iowa 2014). Plaintiff's inalienable state constitutional rights have been violated. This Court has the power and authority to recognize the causes of action which

will provide him with a remedy directly under the Iowa Constitution. It should not hesitate to do so.

The ILC claims in its amicus brief that recognizing a claim for damages under the Iowa Constitution will result in financial stress for state and municipal governments, emotional distress on government officials, a chilling of policy making and "legal uncertainty". (ILC amicus curie brief, p. 16). It believes that these are reasons to foreclose injured individuals from pursuing such a remedy for constitutional violations. However, the United States Supreme Court has held otherwise. See, i.e. *Harlow*, 457 U.S. 800, 818 (1982) (reliance on objective reasonableness of an official's conduct should avoid excessive disruption of government and permit the resolution of insubstantial claims on summary judgment).

Governmental entities can and do incur a certain amount of expense and inconvenience when called upon to defend lawsuits. However, no one suggests that we return to the days of strict sovereign immunity where "the King could do no wrong". Defending lawsuits is what every governmental entity must be prepared to do, as an inevitable consequence of its actions and inaction in the course of interacting with the citizens that they govern or serve. Indeed, the Iowa Tort Claims Act was born of the necessity of

allowing injured individuals to seek redress for wrongs committed against them by such entities. Why should the entire burden of damage resulting from the wrongful acts or omissions of the government be "imposed upon the single individual who suffers the injury, rather than be distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs"? See, *Nixon v. State*, 704 N.W.2d 643, 646 (Iowa 2005), citing Justice Moore' noteworthy dissent in *Boyer v. Iowa High School Athletic Association*, 256 Iowa 337, 349-50, 127 N.W.2d 606, 613 (1964). Defendants' reasons for barring all constitutional claims to the detriment of those who have incurred injury at the hands of government officials do not pass muster.

Further, the "special factors counseling hesitation" which Defendants urge in this case pursuant to *Chappell v. Wallace*, 462 U.S. 296 (1983), do not exist. In *Chappell*, a group of Navy enlisted men brought a race discrimination suit against their superior officers. *Id*., at 299. After granting certiorari, the United States Supreme Court held that the unique disciplinary structure of the military establishment and Congress' activity in the field constituted "special factors" which rendered a *Bivens*-type remedy inappropriate. *Id*. In so holding, the Court observed, "…no military

organization can function without strict discipline and regulation that would be unacceptable in a civilian setting." *Id*., at 300 (citations omitted). Thus, the "special factors" which prohibited a *Bivens* remedy in this case were very narrowly drawn and certainly not applicable in the present case.

D. PLAINTIFF'S CITED IOWA CASE LAW IS APPROPRIATE FOR CONSIDERATION BY THIS COURT

Defendants claim that Plaintiff did not preserve error regarding Iowa jurisprudence and its alleged support of a private cause of action pursuant to the Iowa Constitution. (Ds' brief, pp. 5-6). This is incorrect. The issue here is whether such a cause of action should be recognized in Iowa. It is the central issue in this case. The existence of Iowa case law – historical or otherwise – that speaks to this issue contributes to the discussion, but does not create a separate and distinct issue in and of itself. Defendants' characterization of cited supporting sources as an "issue" is in error.

Raising the question to be decided in a case is all that is necessary for issue preservation. On appeal, it is absolutely appropriate to cite additional case law and supporting sources, even where they have not been cited at the district court level. See, i.e. *Tezlaff v. Camp*, 715 N.W.2d 256, 259 (Iowa 2006) (plaintiffs adequately preserved for issue for appellate review despite

not citing the same supporting source in motion for summary judgment resistance brief).

Defendants specifically complain about Plaintiff's citations to *McClurg v. Brenton, et al*., 123 Iowa 368, 98 N.W. 881 (1904); *Krehbiel v. Henkle*, 178 Iowa 770, 160 N.W. 211 (1909); and *Girard v. Anderson*, 219 Iowa 142, 257 N.W. 400 (1934). Defendants seem to believe that because Plaintiff did not cite the cases in his resistance to motion for summary judgment that he is unable to rely upon them on appeal. This erroneous position is clearly a perversion of the rule. The cases were cited in Plaintiff's opening brief to debunk Defendants' argument that Iowa case law impedes recognizing a private cause of action for damages under the Iowa Constitution, an issue that was argued and decided by the lower court. (P's brief, pp. 63-71). The fact that these cases are "historical" in nature, as opposed to the other Iowa cases considered within the scope of this argument is of no consequence. They are offered for the same premise – namely, that prior Iowa jurisprudence supports the claims at issue in this case.

V. CONCLUSION

WHEREFORE, for the aforementioned reasons, Plaintiff respectfully requests that this Court find that the District Court erred in granting Defendants' Motion for Partial Summary Judgment with respect to Counts VI through IX and to further find that a private cause of action for damages exists pursuant to the Iowa Constitution when a citizen's constitutional due process and equal protection rights as secured by the Iowa Constitution are violated by state actors and further that the rights available under the Iowa Constitution are not cancelled if another statutory or common law cause of action exists.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,855 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Roxanne Conlin — 10/19/2015
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